STATE OF MICHIGAN
SUPREME COURT

ALLY FINANCIAL, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Supreme Court No. 154668 Court of Appeals Docket No. 327815 Court of Claims Lower Court No. 13-000049-MT
SANTANDER CONSUMER USA, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Supreme Court No. 154669 Court of Appeals Docket No. 327832 Court of Claims Lower Court No. 13-000114-MT
SANTANDER CONSUMER USA, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Supreme Court No. 154670 Court of Appeals Docket No. 327833 Court of Claims Lower Court No. 13-000113-MT

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

All branches of government are under fiscal pressure and want to retain every dollar of tax they can. Of that there is no dispute. So here also for the Treasury. The question this case poses is – does the rule of law trump the thirst for tax dollars? If Appellants lose, the answer will come back in the negative.

Appellants Ally Financial, Inc. (Ally) and Santander Consumer USA, Inc. (Santander) filed their Application for Leave to Appeal requesting that the Court review the opinion of the Court of Appeals holding that Ally and Santander are not entitled to sales tax refunds under MCL 205.54i. The Court of Appeals incorrectly deferred to Appellees' unsupported interpretation of the applicable statute, its insistence on documents that the Appellants do not possess, and its rejection of election forms prepared in accordance with the statute.

The Department's brief reveals that it did not have any valid basis for denying the refund claims at issue. The Department fails to provide any rationale for its interpretation of "repossessions" in the sales tax refund statue. Instead, it asks the Court to simply defer to its interpretation. The Department also fails to acknowledge that there is more than one way for a taxpayer to prove that it paid the tax for which it seeks a refund, adamantly insisting on documents that claimants do not have. Finally, the Department refuses to accept the plain language of the joint elections Ally provided.

I. THE DEPARTMENT'S INTERPRETATION OF REPOSSESSED PROPERTY IN MCL 205.54i IS NOT ENTITLED TO RESPECTFUL CONSIDERATION

The term "repossessed property" in MCL 205.54i should only encompass the portion of the bad debt that is recouped through sale of the repossessed property, not the bad debt remaining after application of the repossession sale proceeds. As Ally and Santander described in their Application, virtually every other state in the country, including several with identical

language to Michigan's statutes, interprets "repossessed property" to exclude the balance remaining after the application of the repossession sale proceeds. The Department is almost alone in its strained, arbitrary interpretation of "repossessed property."[1]

As Ally and Santander pointed out at length in their Application, Michigan is a signatory to the Streamlined Sales and Use Tax Agreement ("SSUTA"), a national program designed to provide uniformity in state sales tax laws. Because it participates in the SSUTA, Michigan's bad debt statute is very similar to, or in some cases identical to, other states that participate in SSUTA. Most, if not all, of these other states have similar "repossessed property" language in their bad debt statutes. Yet, nearly all interpret the phrase "repossessed property" in their bad debt statutes to mean that only the value of the repossessed property is used to reduce the amount of the bad debt claim – not, as the Department interprets it – to bar the bad debt claim entirely.

The Department argues that interpretation of other states' similar or identical statutes is "irrelevant" and MCL 205.54i must be construed in accordance with Michigan law. Just as courts may look to the decisions of courts of other states as persuasive authority, the interpretation of other states' statutes with the same or similar language is also persuasive, especially when dealing with uniform laws. *See In re Turpening Estate*, 258 Mich App 464, 466, 671 NW2d 567 (2003) (explaining that when there is a lack of guidance under Michigan law, the court looks to other states' case law interpreting similar statutes); *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 533, 847 NW2d 657 (2014); *Bev Smith, Inc v Atwell*, 301 Mich App 670, 681, 836 NW2d 872 (2013); *Fodale v Waste Mgmt of Michigan, Inc*, 271 Mich App 11, 21, 718 NW2d 827 (2006) (explaining that when uniform laws "have been adopted by several states, the

[1] The Department could only point to one other state that interprets the term "repossessed property" in its bad debt statute the same way as Michigan.

courts of one state may refer to decisions from another state and may construe the statutes in accordance with the construction given by that state").

Because the SSUTA is a set of uniform sales tax laws, it is appropriate to look to other states' interpretations of the similar SSUTA language. It is particularly compelling, given the uniformity of the laws, that most, if not all, other states interpret the phrase "repossessed property" differently than the interpretation given by the Michigan Department of Treasury.

Moreover, as Ally and Santander described in the Application, the Department's interpretation is set forth in Revenue Administrative Bulletin, RAB 1989-61. That RAB, however, only states the Department's interpretation in a conclusory manner. It does not provide any underlying rationale for the interpretation. Ally and Santander ask this Court to examine the Department's interpretation of MCL 205.54i and decide whether its interpretation is in accord with the language of the statute, or whether the Department's interpretation is wrong.

The Department's Answer Brief does not provide any legal basis for this Court to ignore the language of the statute and the rationale for the parties' positions and, instead, decide this case on deference alone. The Department urges the Court to give its interpretation in its RAB respectful consideration citing to *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 678 NW2d 619 (2004) – a case in which this Court actually rejected the Department's interpretation of a statute in the GSTA. The Department, however, cannot "assume this Court's constitutional role as the final arbiter of the meaning of a statute." *In re Complaint of Rovas*, 482 Mich 90, 100 (2008). Although an agency's interpretation of a statute is entitled to "respectful consideration," the agency's interpretation "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id.* at 103. Moreover, this Court in *Rovas* explained that, "'Respectful consideration' is not equivalent to

any normative understanding of 'deference' as the latter term is commonly used in appellate decisions." *Id.* at 108. In its Opinion in this case, the Court of Appeals quoted extensively from the prior panel's decision in the *DaimlerChrysler* case in which the court stated that it was giving "deference" to the Department's interpretation of the statute. (Op, p. 12.) In doing so, the court applied the wrong standard of review. As this Court has made clear, deference is an "inappropriate concept" when a court is reviewing an agency's interpretation of a statute. *Rovas*, 482 Mich at 108. While a court can give respectful consideration to an agency's interpretation of a statute, the court still must ensure that the agency's interpretation does not conflict with the plain language of the statute itself.

The Department has never provided its reasoning or rationale for its interpretation of the term "repossessed property." Now before this Court, the Department still offers no rationale for its interpretation of the statute. Instead, it merely recites that the Department has always interpreted MCL 205.54i to exclude any account where collateral was repossessed and asserts that this interpretation is entitled to deference. The fact that the Department's interpretation of MCL 205.54i is contrary to that of SSUTA states with similar statutes is a strong indication that it is incorrect and that even giving it respectful consideration should not resolve the issue in favor of the Department. Without any rationale for its position, the Department mounts a half-hearted attempt to dismiss Ally's and Santander's references to the language of the statute and the interpretations of other states.

II. ALLY AND SANTANDER PROVIDED SUFFICIENT EVIDENCE THAT SALES TAX WAS PAID ON THE UNDERLYING MOTOR VEHICLE SALES WHICH COMPRISE THEIR REFUND CLAIMS

The Department also argues that the refund claims had to be denied because Ally and Santander failed to provide its preferred documentation showing that sales tax was paid on the

underlying vehicle sales. This is incorrect. Ally and Santander provided RD-108 forms (Application for Title & Registration) for some of the vehicles included in their refund claims and for all of the accounts, Ally and Santander submitted copies of the retail installment sales contracts showing the sales tax as a separately stated item.

Despite this documentation, the Department insisted that Ally and Santander were required to submit validated RD-108 forms for each vehicle included in the claim. Contrary to the Department's insistence that copies of the validated RD-108 forms would be provided by the dealer to Ally and Santander after the sale, as Ally and Santander explained in their Application, the motor vehicle dealers generally do not provide copies of the validated RD-108 forms to them. Ally's and Santander's receipt of the certificate of title confirms that sales tax has been paid on the motor vehicle. There is no reason for the dealer to routinely provide copies of the validated RD-108 forms to Ally and Santander.

The Department contends that MCL 205.54i gives it discretion to determine the evidence necessary to support the bad debt refund claims. According to the Department, it exercises this grant of power "judiciously" by "requiring verifiable evidence already in the taxpayers' possession or that the taxpayer can easily access to support its refund claim." (Department Brief at 23). In this case, the Department is requiring evidence that is not within Ally's and Santander's possession or that they can easily access. While in some cases Ally and Santander can request copies of the RD-108 forms from their dealers, in other cases the records may no longer be available because the dealer has gone out of business or has disposed of the records. The Michigan Dealer Manual only requires motor vehicle dealers to retain the RD-108 forms for five years. *See* Michigan Dealer Manual § 2-1.4 <http://www.michigan.gov/sos/0,1607,7-127-49534_50304_50483-74113--,00.html> (accessed December 9, 2016). The account at issue may

have been written off more than five years from the date of the sale, or the bad debt refund claim may have been filed more than five years from the date of the sale. In those situations, the dealers may have already discarded the RD-108 forms.

The Department also maintains that Ally and Santander can simply request copies of the RD-108 forms directly from the Michigan Secretary of State "for a small fee." *See* Michigan Department of State instructions for obtaining title histories for motor vehicles at <http://www.michigan.gov/sos/0,4670,7-127-1585-28744--,00.html> (accessed December 9, 2016). The Secretary of State charges $11.00 for each title history request, which includes the RD-108 forms. *Id.* $11.00 may be a "small fee" for one transaction, but it adds up to a large fee when multiplied by thousands of accounts. Obtaining copies of the RD-108 forms from the Secretary of State for all of Ally's and Santander's accounts included in the refund claims would cost them tens of thousands of dollars. Additionally, it is not clear that Ally and Santander would even be able to obtain documentation from the Secretary of State sufficient to satisfy the Department because Ally and Santander would be a third party requesting title histories for customers. Because bad debt refund claims are not included as one of the "permissible uses," all "personal information" in the title history will be redacted before it is produced. *Id.* It is not clear whether the Department would be satisfied with a redacted RD-108 form. It is evident that the RD-108 forms are neither within Ally and Santander's possession nor easily obtainable. Therefore, the Department's requirement that these forms be provided is unreasonable. While Ally and Santander recognize that the Department has discretion under MCL 205.54i to determine the documents necessary to support bad debt refund claims, the Department's insistence on a document that is not usually within the creditor's possession or always easily

obtainable by the creditor is simply unreasonable when the claimant has produced other documents that demonstrate payment of the unrecouped sales tax.

Contrary to the Department's position, the RD-108 forms are only one way, not *the* way, to prove sales tax was paid on a vehicle sale. Another way to prove the tax was paid is to provide a copy of the retail installment sales contract that lists the sales tax as a separate line item and a copy of the certificate of title for the vehicle showing that a title was issued. Ally and Santander did this for every account included in their refund claims. The retail installment sales contracts are both a promissory note and a security agreement that are subject to the requirements of the federal Truth In Lending Act, 15 USC § 1601, *et. seq.* and the Michigan Retail Installment Sales Act, MCL 445.851, *et. seq.* Both TILA and the Michigan Retail Installment Sales Act require consumer finance contracts to contain specific disclosures, including a complete itemization of the amount financed. *See* 15 USC § 1638(a)(2)(B)(iii) (requiring disclosure of amounts paid to third parties on behalf of the borrower, which would include sales tax); MCL 445.853(d)(4) (requiring disclosure of the itemized amounts of official fees). The dealers, Ally, and Santander are required by law to accurately and correctly disclose the amount of sales tax paid on the vehicle being financed. If the amounts disclosed, including the sales tax, are incorrect, the dealers and Ally and Santander face penalties under TILA and the Michigan Act.

The issuance of the vehicle's certificate of title proves that the sales tax was actually remitted to the State because a title cannot be issued unless the sales tax is paid in full. MCL 257.815(2). The Department argues that the fact that a title is issued is not dispositive that sales tax was paid because some vehicle sales such as sales to nonprofit schools, churches, or other houses of worship are exempt from tax. In the case of sales to tax-exempt organizations,

however, the retail installment sales contract reflects $0 for sales tax, and those contracts were not included in Ally's and Santander's refund claims.

Finally, even if the Court of Claims deemed Ally's and Santander's documentation inconclusive, the only inference to be drawn from the evidence before the court was that the vehicles were registered and that, as is a statutorily imposed prerequisite to registration, sales tax was paid. To conclude that all the vehicles that Ally and Santander financed in Michigan and for which it incurred bad debt losses were not registered (and that sales tax was not paid) is not a reasonable inference, and it is certainly not one that can be drawn on summary disposition against Ally and Santander as the non-moving party. At the very least, this case should be remanded to the Court of Claims for an evidentiary determination of the amount of sales tax paid on each motor vehicle sale. The Court of Claims erred by granting summary judgment for the Department without making a factual determination of whether sales tax was paid on the motor vehicle sales.

III. ALLY PROVIDED WRITTEN ELECTIONS WITH ITS DEALERS THAT APPLY TO THE ACCOUNTS AT ISSUE IN THIS CASE

Finally, the Department refuses to accept the written election forms executed by Ally and its dealers in accordance with MCL 205.54i. According to the Department, because the election forms were executed by Ally and the dealers after the accounts at issue were written off for accounting purposes, the election forms do not apply to those accounts because they no longer "existed." However, as Ally described in its opening brief, the phrase "currently existing" in the joint election encompasses accounts existing at the time the joint elections were executed, such as the accounts at issue in this case, and accounts to be created in the future by new customers.

The Department's interpretation of the election forms is contrary to the clear intent of the parties' intent expressed by the language of the elections. Moreover, the Department completely

misunderstands the accounting concept of writing off a bad debt, which is a bookkeeping entry and has nothing to do with the enforceability of a debt. If it did there would be no repossessions or foreclosures anywhere in the country for any reason because all of the debts would have been extinguished long before reaching that stage. This is implausible.

Ally adheres to the guidelines provided by the Federal Financial Institutions Examination Council's (FFIEC) Uniform Retail Classification and Account Management Policy. These guidelines provide that actual credit losses on individual consumer credit transactions should be recorded when the lender becomes aware of the loss. After normal collection activity has been exhausted, accounts that are past due 120 cumulative days from the contractual due date will be charged off Ally's books and records. The account is charged off the same month that the account becomes 120 days past due. However, the fact that the loan is charged off a company's books for financial accounting purposes does not mean that the loan is no longer enforceable or that the debt is cancelled. *Mitchell Bank v Schanke*, 676 NW2d 849, 853 (Wis 2004) (explaining that, "When a lending institution 'writes off' a 'bad debt,' it is merely indicating that the debt is uncollectible. That is, it is no longer an asset of the institution. A 'write off' does not mean that the institution has forgiven the debt or that the debt is not still owing.").

A creditor can still try to collect a debt that it has charged off its books until the statute of limitations expires on the underlying promissory note, which in Michigan is six years from the accrual of the cause of action. MCL 600.5807(8). The fact that the written election forms were signed after Ally wrote off the debts does not change the fact that the election forms included all accounts assigned by the dealer to Ally, at the time of the execution of the election form and for all future accounts. The Department's argument to the contrary is nonsensical.

IV. REQUESTED RELIEF

For the reasons set forth above and in Ally's and Santander's Application for Leave to Appeal, Ally and Santander respectfully request that this Honorable Court grant leave to appeal, reverse the Court of Appeals' decision, and find that Ally and Santander are entitled to a refund of sales tax paid on bad debts under MCL 205.54i.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2016, I electronically filed Plaintiffs/Appellants, Ally Financial, Inc. and Santander Consumer USA, Inc.'s Reply Brief in Support of Application for Leave to Appeal with the Clerk of the Court using the TrueFiling System which will give notice of such filing to all parties of record.

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